Before the
Administrative Hearing Commission
State of Missouri

MICHAEL G. WELLS, D.O.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 12-2064 SP
	)	
DEPARTMENT OF SOCIAL SERVICES, MO HEALTHNET DIVISION,	)	
	)	
Respondent.	)	

DECISION

The petitioner, Michael G. Wells, D.O., failed to timely seek review by this Commission of the denial of his Medicaid claims for reimbursement. We dismiss his complaint.

Procedure

Dr. Wells filed a letter with this Commission on November 26, 2012, which we treated as a complaint. In lieu of an answer, the respondent, the Department of Social Services, MO HealthNet Division (the Department), filed a motion to dismiss or for a more definite statement, on December 28, 2012. Dr. Wells filed a response on January 4, 2013.

Because Dr. Wells had not, as of January 2013, provided a copy of the "notice of action of which [he sought] review," as required by 1 CSR § 15-3.350(2)(B)1[1], we ordered the parties to submit such material and written argument as appropriate to demonstrate this Commission's

[1] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

jurisdiction, by February 5, 2013. We also permitted the parties to respond to each other's submissions by February 15, 2013.

Dr. Wells filed, on February 4, 2013, unauthenticated copies of Explanation of Benefits (EOB) statements to show notice of the Department's denial of claims he submitted and resubmitted.[2] In addition, Dr. Wells filed written argument on February 4 and 6, the Department filed a response in support of dismissal on February 15, and Dr. Wells filed a final response on February 27, 2013.

The Department's motion to dismiss is a motion for involuntary dismissal. We may grant such a motion based on a preponderance of the admissible evidence. 1 CSR 15-3.436(3). Admissible evidence includes allegations contained in the complaint, stipulations, or other evidence admissible under the law. *Id.* If the motion relies on matters other than the allegations contained in the complaint, or stipulations, then we must treat it as one for summary decision under 1 CSR 15-3.446, or convene an evidentiary hearing on the motion.

We treat the Department's motion to dismiss as one for summary decision. The findings of fact below are taken from Dr. Wells' complaint. They are also based on admissions we draw from the EOB statements Dr. Wells filed, and those admissions contained in his Response to Motion to Dismiss or for More Definite Statement.

[2] The EOB statements contain private medical information about patients whom Dr. Wells treated. Neither he nor the Department asked this Commission to seal these records to protect the patients' privacy. On our own motion, we order the EOB statements sealed because the records are protected by physician-patient privilege and the patients have not waived that privilege. *See State ex rel. Stinson v. House*, 316 S.W.3d 915, 918 (Mo. banc 2010) (physician-patient privilege applies to medical records and discovery); § 610.021(14), RSMo (Commission may close records protected by law); and § 491.060(5), RSMo (2000) (establishing physician-patient privilege). References to "RSMo" are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

Findings of Fact

1. In 2002, 2003, 2004, and 2005, Dr. Wells provided medical services to patients in the Missouri Medicaid program.

2. Dr. Wells submitted, and in some instances resubmitted, claims for reimbursement to the Department for his provision of these services.

3. He received EOB statements, labeled "remittance advice," from the Department. Among other information, the EOB statements contain the patients' names, the dates services were provided, the "billed amount," the "allowed amount," the "cut/back" amount (expressed as a negative number), the "payment amount," and "adjust reason codes."

4. Some of the EOB statements bear a handwritten or stamped-on "received" date, all of which are within about one to six months of the date services were provided.

5. Some of the EOB statements have handwritten or stamped-on notes reflecting a "resent" or "resubmitted" date within a few months of when the services were provided.

6. The EOB statements reflect that the Department rejected some of his claims for payment in whole, and rejected others in part.

7. Dr. Wells admits "[d]iscovery of the failure of the Respondent [Department] to pay these medical claims occurred on or about July 15, 2005."[3]

8. Before he filed his appeal with this Commission, Dr. Wells filed a case in small claims court, seeking relief similar to what he seeks here.

9. Dr. Wells filed his appeal with this Commission in November 2012.

[3] Dr. Wells' Response to Motion to Dismiss or for More Definite Statement, p. 1, ¶ 4.

Conclusions of Law

We have jurisdiction. §§ 208.156.2, RSMo,[4] and 621.055, RSMo. As the service provider who is seeking review, Dr. Wells bears the burden of proof here. § 621.055.1.

Sections 208.156.2 and 621.055 both provide that "[a]ny person authorized under section 208.153 to provide services for which benefit payments are authorized under section 208.152" may seek review with this Commission of certain actions of the Department in regard to payments. Section 208.156.2, RSMo, specifically provides the right of review to a person "whose claim for reimbursement for … services is denied or is not acted upon with reasonable promptness[.]" Section 208.156.8, RSMo, establishes requirements for seeking review, including a time limitation: An aggrieved provider "shall have thirty days from the date of mailing or delivery of a decision of the department of social services or its designated division in which to file his petition for review" with this Commission.

The Department argues that Dr. Wells filed his claim here out of time and it should be dismissed. We agree. As noted above, an aggrieved provider has 30 days from the date of mailing or delivery of the Department's decision to seek review with this Commission. § 208.156.8. The EOB statements, or remittance advice documents, Dr. Wells received constituted notice of the Department's decisions regarding each of his claims. They provided detail about each claim he made to the Department for payment, including the name of the patient, the date he provided the service, the amount he billed, the amount the Department allowed, how much of the claim the Department "cut/back," the amount he was paid, and a code for the reason a claim was adjusted. Some of the EOB statements reflect the date Dr. Wells received them, and they were dates within several months of the dates he provided the services in 2002-2005. Some EOB statements reflect that some claims were even resubmitted in the same

[4] References to § 208.156 are to RSMo (2000).

time frame. By the very latest, and by Dr. Wells' own admission, he discovered in July 2005 that the Department had denied payment of certain claims he submitted, or had paid less than what he requested for certain claims.

But he did not appeal to this Commission until November 2012, well outside the 30-day window provided by § 208.156.8, and in fact, at least seven years too late in regard to even the most "recent" reimbursement claims at issue here.

Dr. Wells argues that we can address the merits notwithstanding, because of the way the Department handled related, previous litigation. Both parties note that this Commission was not Dr. Wells' first stop for review, explaining that he first filed in small claims court. There, Dr. Wells says, the Department took the position that he should have first exhausted his administrative remedies in this Commission, and that the court dismissed his case based on the Department's argument.[5] So, he reasons, the Department cannot now be heard to seek dismissal here.[6] Even assuming his description is true, our conclusion remains the same.

As discussed above, a statutory remedy exists under § 208.156.2 for review by this Commission when the Department does not reimburse Medicaid providers as they have requested. This remedy provides for reimbursement for the Medicaid provider, § 208.156.2; interest at the rate of eight percent per annum, § 621.055.1; and attorney fees, 1 CSR 15-3.560. "Ordinarily, if the administrative remedy is adequate, it is exclusive." *State ex rel. Oakwood Manor Nursing Center v. Stangler*, 809 S.W.2d 90, 92 (Mo. App. W.D. 1991)(internal quotation and citation omitted). And if a party has not exhausted an adequate, existing administrative remedy relating to a claim, a court will not entertain the claim. *Id. See also Shafinia v. Nash*, 372 S.W.3d 490, 493 (Mo. App. W.D. 2012) ("The law requires pursuit of one's administrative remedies as a pre-requisite to judicial review.").

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[5] *See* Dr. Wells' Response to Order to Show Cause, filed February 6, 2013.

[6] *Id*.

There can be no dispute that an adequate administrative remedy exists here. Dr. Wells seeks reimbursement and interest,[7] for which the remedy provides. Therefore, it is, or was, his exclusive remedy.

But, Dr. Wells also argues, this Commission must proceed to address the merits now, notwithstanding that the 30-day window has closed, because applying the time limit of the administrative scheme would make "futile" his effort to obtain review.[8] He points to the *Mathews v. Eldridge*, 424 U.S. 319 (1976), futility exception to the exhaustion doctrine. The exception does not apply here.

The exception applies when "there is doubt about whether the agency could grant effective relief." *Ace Property and Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 1000 (8th Cir. 2006). An agency cannot grant effective relief, for example, when it is requested to rule on the constitutionality of a statute and lacks the statutory authority to do so. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). The exception does not apply when a party simply fails to timely avail himself of an available remedy.

The Missouri Court of Appeals for the Western District addressed an argument similar to Dr. Wells' in *Shafinia*, 372 S.W.3d 490. There, a property owner disagreed with the assessed valuation assigned to his real property by local officials, but he failed to seek administrative review by the local board of equalization under the procedure established by law. *Id.* at 491-492. He argued that he tried to meet with the county appraiser to schedule an informal reappraisal of his properties, but the meetings fell through. *Id.* at 493. He also claimed that staff at the county collector's office twice told him, incorrectly, that his only option was to seek judicial review. *Id.* at 493. He then filed for judicial review, and the circuit court issued summary judgment against him, on the basis that he had failed to exhaust his administrative remedies. *Id.* at 492.

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[7] Dr. Wells' Response to Motion to Dismiss or for More Definite Statement, p. 2, ¶ 2, filed January 4, 2013.

[8] *Id.* at p. 2, ¶ 8.

On appeal, he argued he was essentially "misled" and so should not be held to any requirement to exhaust. *Id.* at 494. The appellate court disagreed:

> Even if all of that were true, it changes nothing. The law requires pursuit of one's administrative remedies as a pre-requisite to judicial review…. Exceptions are not made for those who are confused or misled…. Thus, …there is nothing this court can do to assist [Mr. Shafinia] as to the assessments. State law provides a remedy for him through his right of appeal to the Board of Equalization. He did not make use of his remedy.

Id. at 493 (internal citations omitted).

The appellate court expressly acknowledged that although Mr. Shafinia missed his window of opportunity to exercise his right of administrative review, the court could not afford him any relief:

> Because Mr. Shafinia did not timely exercise his right to appeal the increase in assessed valuation to the Platte County Board of Equalization pursuant to the applicable statutes, he could not lawfully proceed with his attempt at judicial review, because the circuit court lacked authority to proceed.

Id. at 494.

Likewise, with respect to Dr. Wells, the small claims court could not have heard his claim in the first instance, because he did not exhaust his administrative remedy in this Commission. And this Commission cannot overlook the 30-day time limit established in § 208.156.8 for filing such cases here. This Commission is a creature of statute and can exercise only those powers conferred by law, not expand them. *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991). Therefore, we are bound to apply § 208.156.8's time limit.

That does not mean this Commission lacks jurisdiction, as the Department argues.[9] A tribunal vested with jurisdiction over a particular category of cases has jurisdiction to hear and dispose of such cases, including ones filed out of time. *See Shafinia*, 372 S.W.3d at 494-495 and n.2 (explaining that whether a party has exhausted does not create a jurisdictional issue in circuit court, simply an issue of court's authority) (*citing McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 477 (Mo. banc 2009)).[10] A tribunal with jurisdiction may simply lack *authority* to grant certain relief requested, such as when a claimant seeks relief beyond a statutorily established time limit.

Here, as previously discussed, there is an adequate administrative remedy that applies to Dr. Wells' claims—we have jurisdiction, perforce. If we did not, Dr. Wells might have been able to proceed in his small claims case in the first instance. We simply lack *authority* under the law to grant him relief.

Therefore, because Dr. Wells failed to timely file for review with this Commission, we can and must dismiss.

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[9] *See* Department's Motion to Dismiss or for More Definite Statement, pp. 2-3, ¶ 7, filed December 28, 2012.

[10] The Supreme Court in *McCracken* further explained:

> [T]o the extent that some cases have held that a court has no jurisdiction to determine a matter over which it has subject matter and personal jurisdiction, those cases have confused the concept of a circuit court's jurisdiction—a matter determined under Missouri's constitution—with the separate issue of the circuit court's *statutory or common law authority* to grant relief in a particular case.

298 S.W.3d at 477 (emphasis in original) (*citing J.C.W. v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009)).

Summary

The Department's motion to dismiss is granted.

The Department's motion in the alternative for a more definite statement is denied as moot.

The portion of the record containing EOB statements is ordered sealed.

The hearing scheduled for April 19, 2013 is canceled.

SO ORDERED on April 2, 2013.

/*s/ Alana M. Barragán-Scott*_____
ALANA M. BARRAGÁN-SCOTT
Commissioner